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J.D., Loyola Law School, 2013

Recommended Citation

Philip P. Soo, *Enforcing a Unitary Patent in Europe: What the U.S. Federal Courts and Community Design Courts Teach Us*, 35 Loy. L.A. Int'l & Comp. L. Rev. 55 (2012).

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Enforcing a Unitary Patent in Europe: What the U.S. Federal Courts and Community Design Courts Teach Us

PHILIP P. SOO*

I. INTRODUCTION

Document Security Systems (“DSS”), a company in Rochester, New York, provides advanced anti-counterfeiting technologies to corporations, banks, and governments worldwide.¹ One of its proprietary technologies is a method of making a document cleverly induce a moiré pattern (i.e. optical interference pattern) when the document is photocopied, thus making it immediately apparent that the copy is a counterfeit.² European Patent No. 0455750, granted in 1999, eventually provided DSS patent rights to this method in thirteen European countries.³ Upon discovering that the European Central Bank (“ECB”) was using this anti-counterfeiting measure, DSS filed an infringement suit in August 2005, claiming that the ECB manufactured and distributed euro banknotes using its patented technology.⁴

The ECB would not go quietly, challenging the venue of the lawsuit and arguing that each individual country where the ECB

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1. About DSS, DOC. SEC. SYS., <http://www.dsssecure.com/about-dss> (last visited June 30, 2012).

2. See EP Patent No. 0455750, ¶¶ 7–9 (filed Jan. 16, 1990).

3. *Id.* ¶ 1.

4. Case T-295/05, Document Sec. Sys. v. European Cent. Bank, 2007 E.C.R. II-2844, ¶¶ 15–16, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005B0295:EN:HTML>.

operates must be sued on a nation-by-nation basis.⁵ In March 2006, the ECB filed counterclaims in the United Kingdom and Luxembourg in parallel actions, seeking to invalidate the patent on the basis that it lacked novelty.⁶ Challenges to the validity of the patent, largely in the same form, were subsequently served in the Netherlands, Germany, Austria, Italy, Spain, Belgium, and France.⁷ The United Kingdom, a forum with a recent reputation for being unfriendly to patent proprietors,⁸ declared the DSS patent invalid for a different reason—that the patent disclosure was insufficient to support the claims.⁹ Yet, just a day later, the comparatively pro-patent Germany held that the same patent was valid.¹⁰

Six years have gone by since the initial DSS lawsuit, and there is still no agreement over the validity of European Patent No. 0455750. Three jurisdictions—Germany, the Netherlands, and Spain—have upheld the validity of the DSS patent.¹¹ Courts of the United Kingdom, Austria, Belgium, and France invalidated the patent, while the question of invalidity in Italy is still pending.¹² Who are the casualties in this bewildering state of affairs? The primary losers are ostensibly the litigants. Lawsuits are notoriously costly, with average litigation costs in just four European countries totaling about €3.6 million (\$4.6 million in 2012).¹³ The countries also suffer, since duplicative litigation results in a substantial waste of judicial resources. Perhaps the greatest casualty of all is the European patent system itself, since confusing and contradictory rulings irreparably damage its credibility and standing amongst present and future patent proprietors.¹⁴

This Note submits that a unitary patent right in Europe is ripe and should be timely promulgated to incentivize innovation and investment

5. *Id.*

6. *Id.* at II-2844.

7. *Id.*

8. See Gary Moss & Robert Lundie Smith, *Forum Shopping: Is the England and Wales Patents Court Really a Non-Starter for Patentees?*, 6 J. INTELL. PROP. L. & PRAC. 715 (2011), available at <http://www.mwe.com/info/pubs/rls0711.pdf>.

9. *Document Sec. Sys.*, 2007 E.C.R. at II-2845.

10. See Moss & Smith, *supra* note 8, at 4 (acknowledging the preference for Germany and the Netherlands as forums for litigation as a patentee).

11. Mary Stone, *Court Rules Document Security Systems Patent Valid in Spain*, ROCHESTER BUS. J. (Mar. 24, 2010, 3:36 PM), available at http://www.rbj.net/print_article.asp?aID=183392.

12. *Id.*

13. Malwina Mejer & Bruno van Pottelsberghe de la Potterie, *Beyond the Prohibitive Cost of Patent Protection in Europe*, VOX (Apr. 10, 2009), <http://voxeu.org/index.php?q=node/3440>.

14. *Id.*

needed in the presently embattled European economy. Part II begins by tracing the evolution of European patent rights, from the Paris Convention to the Patent Cooperation Treaty, and most recently to the European Patent Convention. From there, Part II reviews past efforts to integrate these rights and the ultimate failure of these efforts to provide multinational patent enforcement in Europe. Part III will then examine both legal and practical issues confronting a unitary patent system, emphasizing the challenges in harmonizing the European Patent Convention with the governing European Union treaty for countries bound by both agreements.

Part IV follows up this discussion with a comparison between two existing approaches to achieving a unified patent court: one based on the U.S. Federal Court system and the other based on European Community design courts. While both approaches effectively enforce a unitary right, the latter approach should inform the unitary patent project.

Finally, Part V addresses specific criticisms leveled at the current Patent Court agreement concerning, in particular, its legality and practicability. First, under both the European Patent Convention and governing EU treaties, the roles played by non-European Union institutions, particularly the European Patent Organization and the Patent Court, have an express legal basis. Second, the proposed regulation and agreement rightfully empowers the European Court of Justice ("ECJ") to check the Patent Court in matters of patent law. Part V concludes by cautioning that the ECJ, if so empowered, should emulate the judicial restraint of the U.S. Supreme Court in creating a viable legal foundation for a unitary patent system.

II. EUROPEAN PATENT LAW REMAINS FRAGMENTED DESPITE GROWING ECONOMIC INTERDEPENDENCE AMONGST EUROPEAN COUNTRIES

A. Historically, Territoriality Governed European Patent Rights

Patents are granted for useful inventions, including improvements, which satisfy a minimal level of non-obviousness.¹⁵ A purpose of patent law is to encourage innovation by providing an inventor a limited monopoly whereby others can be excluded from marketing and

15. See W.R. CORNISH, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS* § 1-01 (4th ed. 1999).

financially exploiting the invention.¹⁶ In exchange, the invention is fully disclosed to the public, where the disclosure can spur further inventions, ultimately benefitting society.¹⁷

Historically, patent rights followed the principle of territoriality: each country created and enforced its own patent rights exclusively within its jurisdiction.¹⁸ Following the Second World War, however, the political and economic structure of Europe became transformed as countries realized the potential benefits of integration.¹⁹ In 1957, talks culminated in six European countries signing the Treaty of Rome, which created the European Economic Community (“EEC”).²⁰ The Treaty of Rome sought, “by establishing a common market and an economic and monetary union . . . to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth . . . a high degree of convergence of economic performance . . . and economic and social cohesion and solidarity among Member States.”²¹ In an effort to promote further economic, social, judicial, and political cohesion, the Treaty on European Union successively amended first the Treaty of Rome, and then the Treaty on the Functioning of the European Union (“Lisbon Treaty”).²² As will be discussed, the latter treaty further reformed EU institutions and provided a new legal basis for EU-wide intellectual property rights.

16. Daniel Hanrahan, *Get Your Dirty Gray Market Goods Out of My Country — Enforcement of Patent Rights in the EU*, 18 DIGEST 1, 2 (2010).

17. Alan Devlin, *The Misunderstood Function of Disclosure in Patent Law*, 23 HARV. J.L. & TECH. 401, 402 (2010).

18. Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT’L L. 333, 340–41 (1999).

19. See GEORGE A. BERMAN ET. AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 396 (1993).

20. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome], available at http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf.

21. Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 40, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:325:0001:0184:EN:PDF>.

22. See Treaty on European Union, Jul. 29, 1992, 1992 O.J. (C 191) 1, available at http://www.ecb.int/ecb/legal/pdf/maastricht_en.pdf; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter TFEU], available at http://www.ecb.europa.eu/ecb/legal/pdf/en_lisbon_treaty.pdf.

B. The Current European Patent Does Not Provide a Unitary Right

The merits of a unified patent system in Europe will not be fully appreciated without first examining the prevailing procedures for patent grant and enforcement, which are closely intertwined. As will be shown, the current European Patent system, despite being crafted in the spirit of integration, fragments the European market and suppresses innovation.²³

The present patent grant system in Europe incorporates particular aspects of a European common market in procedure while retaining traditional aspects of territoriality in substance.²⁴ At one time, the process of obtaining a patent was purely national. A patent applicant was forced to apply simultaneously in every country in which protection was sought, since a patent filing in one country destroyed novelty for subsequent applications anywhere else.²⁵ The high upfront costs were prohibitive to most applicants seeking multinational patent protection.²⁶

The International Convention for the Protection of Industrial Property, or Paris Convention, became effective in 1884 and was a primary step in harmonizing patent rights between countries.²⁷ The Paris Convention established two fundamental principles: (1) national treatment, and (2) right of priority.²⁸ National treatment requires member states to give nationals of other member states the same advantages under their domestic patent laws as they give to their own nationals.²⁹ Right of priority entitles a patent applicant of one member country to a period of twelve months after the initial patent application to apply for protection in all of the other member countries.³⁰ As a

23. Joseph Straus, *The Present State of the Patent System in the European Union as Compared with the Situation in the United States of America and Japan*, in MAX PLANCK INSTITUTE FOR FOREIGN AND INTERNATIONAL PATENT, COPYRIGHT AND COMPETITION LAW 5 (1997), available at <http://www.suepo.org/public/background/straus.pdf>.

24. Gretchen Ann Bender, *Clash of the Titans: The Territoriality of Patent Law vs. the European Union*, 40 IDEA 49, 53 (2000).

25. See Gerald J. Mossinghoff & Vivian S. Kuo, *World Patent System Circa 20XX, A.D.*, 38 IDEA 529, 532 (1997–1998).

26. See Bender, *supra* note 24.

27. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention], available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and amended on September 28, 1979).

28. *Id.* arts. 2, 4.

29. *Id.* art. 2.

30. *Id.* art. 4.

result, a patent applicant in any member state can enjoy an early priority date, while gaining a full year to evaluate the economic viability of the invention before committing the exorbitant costs of filing in multiple countries around the world.³¹ One hundred seventy-four countries, including essentially all of Europe, are contracting parties to the Paris Convention.³²

The 1970 Washington Treaty, or Patent Cooperation Treaty ("PCT"), took an additional step toward harmonization, by allowing a patent applicant to file an "international" patent application that has effect in many countries.³³ The treaty's primary objective was to help "minimize duplicative patent application and examination worldwide."³⁴ In brief, the PCT allows for filing of an international application in any of several designated patent offices.³⁵ An international search authority (provided by one of several designated national patent offices) generally then classifies the invention, performs a search, and provides a search report and written opinion concerning the novelty, inventive step, and industrial applicability.³⁶ Generally around thirty months after filing, the PCT application enters the "national phase," where rights can be continued by filing in national patent offices, along with required translations and fees.³⁷ Patent examiners in each country then individually assess the patentability of the claimed invention, resulting in either patent grant or rejection.³⁸ Thus, while the PCT consolidates the initial application process and provides an additional eighteen months beyond the Paris Convention date to reflect on the desirability of seeking protection in foreign countries, "it does not alter the substantive requirements of patentability in the Member States."³⁹

31. Bender, *supra* note 24, at 55.

32. See *Summary Table of Contracting Parties to the Paris Convention*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2 (last visited Sep. 5, 2012). The tiny country of Brunei Darussalam was the latest to join, becoming a party on February 17, 2012. *Id.*

33. See Patent Cooperation Treaty arts. 9, 11, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 [hereinafter PCT], available at <http://www.wipo.int/pct/en/texts/pdf/pct.pdf>. (amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001).

34. Bender, *supra* note 24, at 55.

35. *Id.* at 56.

36. *Id.*

37. *Id.*

38. *Id.*

39. PCT, *supra* note 33, art. 27(5); see also Binder, *supra* note 24, at 57 (noting that member states retain ability to legislate their own standards of patentability and restrict the types of patents that can be granted).

Following the PCT, Europe forged its own regional patent system. Spurred in part by the desire to harmonize traditionally national patent laws within the EEC, the 1973 European Patent Convention (“EPC”) established a multinational system for granting patents throughout Europe.⁴⁰ The EPC allows an applicant to file a consolidated “European Patent” application with the European Patent Office (“EPO”). The European Patent is capable of granting parallel patent rights in any number of designated countries participating in the Convention.⁴¹ Advantages of this system include: (1) a centralized grant procedure in one of three official EPO languages (German, French, and English); (2) reduced costs, if the applicant seeks protection in many European countries; and (3) a comprehensive prior art search and examination.⁴² The EPC provides quality control through a nine-month “opposition period” beginning immediately after the grant, during which third parties may challenge and revoke claims of the patent.⁴³ Independent Boards of Appeal examine decisions of the receiving, examining, legal, and opposition divisions of the EPO.⁴⁴ Significantly, the EPC operates outside of the framework of the Treaty of Rome, and hence the EPO is not an EU institution.⁴⁵

Participation in the EPC patent grant system has always been optional.⁴⁶ Patent applicants in the EU may forgo the EPC and directly file patent applications with national patent offices.⁴⁷ Moreover, patents granted by the EPO for a state generally have the same effect and are subject to the same conditions as those granted by a national patent office.⁴⁸ Nonetheless, the EPC has been highly successful.⁴⁹ Patent filings climbed from 106,346 to 142,810 with record highs in seven out

40. Convention on the Grant of European Patents (European Patent Convention), Oct. 5, 1973, 1065 U.N.T.S. 199 [hereinafter EPC], *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%201065/volume-1065-I-16208-English.pdf>. (as revised by “Act revising Article 63 EPC of December 17, 1991” and “Act revising the EPC of November 29, 2000”).

41. *Id.* art. 67(1).

42. Kevin R. Casey, *The European Patent “Situation,”* 9 DEL. L. REV. 107, 108 (2007).

43. *See* EPC, *supra* note 40, arts. 99, 100.

44. *See* EPO – *Boards of Appeal*, EUR. PAT. OFF. (Nov. 3, 2011), <http://www.epo.org/about-us/boards-of-appeal.html><http://www.epo.org/about-us/boards-of-appeal.html>.

45. Straus, *supra* note 23, at 1.

46. *See* Seth Cannon, *Achieving the Benefits of a Centralized Community Patent System at Minimal Cost*, 35 CASE W. RES. J. INT’L L. 415, 418 (2003).

47. *Id.*

48. *Id.* at 419.

49. *Id.*

of ten years.⁵⁰ The number of “European Patents” granted also generally increased from 49,365 in 2002 to 64,346 in 2011.⁵¹ As of this writing, thirty-eight member states participate in the EPC.⁵²

C. *The National Courts Cannot Harmonize Fragmented Patent Rights*

The proponents of a unified European Community faced a major hurdle in their efforts toward harmonizing patent enforcement. While the EPC provided a logical foundation, its end product was a nonstarter—a “bundle” of national patent rights that must be enforced individually in the national courts of its respective member states.⁵³ The EPC created a unified system for examining and granting patents, yet infringement disputes are adjudicated by national courts.⁵⁴ Each court applies its own national rules for claim construction and infringement analysis, which creates the potential for inconsistent infringement rulings.⁵⁵ As noted by scholar Graeme Dinwoodie:

To obtain relief in more than one country for acts of intellectual property infringement, a plaintiff was required to sue separately in every country in which infringement was alleged to have occurred, notwithstanding that the allegations might involve the same conduct by the same defendant with respect to what *in fact* was the same piece of intellectual property.⁵⁶

In 1989, Dutch courts led the initial charge against territoriality with a landmark decision in a trademark case, *Lincoln v. Interlas*, which established the basis for multinational patent enforcement for nearly two decades.⁵⁷ Interlas was a Dutch company that “imported diesel welding units bearing the ‘Lincoln’ trademark from the U.S. into the Netherlands, modified the units, and offered them for sale throughout

50. *European Patent Applications Filed with the EPO*, EUR. PAT. OFF. (June 6, 2011), <http://www.epo.org/about-us/statistics/patent-applications.html>.

51. *Id.*

52. *Member States of the European Patent Organisation*, EUR. PAT. OFF. (Mar. 10, 2011), <http://www.epo.org/about-us/organisation/member-states.html> [hereinafter EPO Member States].

53. See EPC, *supra* note 40, art. 2(2); Mossinghoff & Kuo, *supra* note 25, at 542.

54. See EPC, *supra* note 40, arts. 63(2).

55. See Brian Turner, *The German Formstein Case: An Alternative Harmony*, 14 EUR. INTEL. PROP. REV. 181 (1992).

56. Graeme B. Dinwoodie, *Boundaries of Intellectual Property Symposium: Crossing Boundaries: Developing A Private International Intellectual Property Law: The Demise Of Territoriality?*, 51 WM. & MARY L. REV. 711, 733 (2009).

57. HR 24 November, 1989, NJ 1992, 404 m.nt. (Lincoln/Interlas) (Neth.).

Europe.”⁵⁸ The Dutch owner of the trademark sued Interlas for trademark infringement in the Netherlands.⁵⁹ The owner, who also held trademark rights in Belgium and Luxembourg, sought injunctive relief in all three countries.⁶⁰ At that time, rules of international jurisdiction were set out by the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”) and made applicable to EU member states.⁶¹ The Dutch court granted the injunction in the Netherlands, Belgium, and Luxembourg.⁶² On appeal, the Dutch Supreme Court affirmed the injunction on the basis that intellectual property transcends national borders and it would be undesirable for an injured party to be forced to file suit in every country where infringement occurred.⁶³

Following *Interlas*, Dutch courts extended the principle of cross-border injunctive relief to matters of patent infringement.⁶⁴ Although the Brussels Convention does not directly address patent infringement, Dutch courts cited Article 24 of the agreement, which provided that “application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the laws of that state, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.”⁶⁵ Patent holders bringing enforcement proceedings in Dutch courts also successfully invoked a nuance in the Brussels Convention that further extended their jurisdictional reach.⁶⁶ Article 6(1) allows defendants to a multi-party suit who are domiciled in different

58. *Id.*

59. *Id.*

60. *Id.*

61. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention], available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:HTML). (the Brussels Convention was later revised in the 1978 Accession Convention to include Article Vd, which provided “exclusive jurisdiction of the courts of each Contracting State for any European patent granted for that state, regardless of domicile of the defendant and without prejudice to the jurisdiction of the EPO under the EPC.” Straus, *supra* note 23, at 406.

62. Lincoln/Interlas, *supra* note 57.

63. *Id.*

64. Kerry J. Begley, *Multinational Patent Enforcement: What the “Parochial” United States Can Learn from Past and Present European Initiatives*, 40 CORNELL INT’L L.J. 521, 546 (2007).

65. Brussels Convention, *supra* note 61, art. 24. See also Begley, *supra* note 64, at 547.

66. Beth Z. Shaw, *Court Rules Against Cross-Border Enforcement of “European” Patent Rights*, Legal Opinion Letter, WASH. LEGAL FOUND. (Oct. 6, 2006), available at <http://www.wlf.org/upload/100606shaw.pdf>.

contracting states to be sued in any contracting state where one of the defendants is domiciled.⁶⁷ Before long, the Netherlands became an attractive European forum for patent proprietors fighting infringement of patent equivalents in other countries.⁶⁸

Almost seventeen years after the *Interlas* decision, the European Court of Justice ("ECJ," now the Court of Justice for the European Union⁶⁹) dealt a heavy blow to cross-border injunction practice in *Roche Nederland v. Primus* ("Roche") and *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG* ("GAT").⁷⁰ As will be explained, *Roche* and *GAT* severely limited the practical ability for companies to consolidate enforcement proceedings when infringement is suspected in multiple countries.

In *Roche*, two U.S. doctors, Primus and Goldenberg, sought consolidated infringement proceedings in Dutch courts against Roche Nederland BV and eight other companies in the Roche group.⁷¹ The eight non-Dutch companies in the Roche group contested the jurisdiction of the Dutch court.⁷² Citing Article 6(1) of the Brussels Convention, the lower court held that it had jurisdiction over all nine co-defendants.⁷³ The question was appealed to the Dutch Supreme Court, and then to the ECJ,⁷⁴ which ultimately held that the dispositive rule was Article 2, which provides that "persons domiciled in a contracting state of the Brussels Convention must be sued in the courts of that state."⁷⁵ According to the court, the Article 6(1) exception was inapposite because it only applies if the defendants' acts were so connected that it would be "expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings."⁷⁶ Since patent rights must be considered in view of the

67. Brussels Convention, *supra* note 61, art. 6(1).

68. Marketa Trimble, *Emerging Scholar Series: Cross-Border Injunctions in U.S. Patent Cases and Their Enforcement Abroad*, 13 MARQ. INTELL. PROP. L. REV. 331, 357 (2009).

69. Under the Treaty of Lisbon, the Union adopted a new institutional framework in which the court system of the European Union will be known as the Court of Justice of the European Union, or CJEU. The CJEU comprises three courts: the Court of Justice, the General Court and the Civil Service Tribunal. To avoid confusion, the abbreviation "ECJ" will continue to be used in this Note when referring to the Court of Justice within the CJEU.

70. Begley, *supra* note 64, at 525.

71. See Case C-539/03, *Roche Nederland BV v. Primus*, 2006 E.C.R. I-6535 at I-6575-76.

72. Begley, *supra* note 64, at 549.

73. *Id.* at 550.

74. *Id.*

75. Brussels Convention, *supra* note 61, art. 2.

76. *Roche Nederland BV v. Primus*, 2006 E.C.R. at I-6535.

relevant national law of each member state, divergent holdings on infringement could not be deemed to be “irreconcilable,” therefore rendering cross-border enforcement unavailable.⁷⁷

In *GAT*, the ECJ addressed a second stumbling block to patent enforcement—the issue of patent invalidity.⁷⁸ The claimant *GAT* was competing with *LuK* to supply a third party company with a mechanical damper spring.⁷⁹ *LuK* alleged that *GAT* was in breach of certain French patents of which it was the registered proprietor.⁸⁰ *GAT* then filed suit in a German court requesting a declaration that *LuK* had no entitlement under the French patents and further that the patents were invalid.⁸¹ The German court held that it had jurisdiction to adjudicate both the infringement and invalidity issues, a matter which *GAT* appealed and thereafter referred to the ECJ.⁸² The ECJ held for *GAT*, reasoning that under Article 16(4) of the Brussels Convention, the national courts of the granting state have exclusive jurisdiction as to patent validity.⁸³ Further, this exclusive jurisdiction applies irrespective of whether the party challenging the validity brought proceedings specifically to invalidate the patent, or merely as a defense to an infringement action.⁸⁴ This end result is inimical to centralized patent infringement proceedings, because accused patent infringers routinely assert invalidity of the patent as a defense.⁸⁵

In conclusion, the *Roche* and *GAT* cases highlight the reluctance of the ECJ to compromise the national interest of EU member states and raise legal considerations concerning these national interests that must

77. *Id.* at I-6581.

78. Case C-4/03, *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG*, 2006 E.C.R. I-6509 at I-6526.

79. *Id.* at I-6528, ¶ 9.

80. *Id.*

81. *Id.*

82. *Id.* ¶¶ 11–12.

83. *Id.* ¶ 22.

84. Begley, *supra* note 64, at 552.

85. *Id.* at 553. This case also foreshadows an obstacle in the enforcement of a modern unitary patent right, that of bifurcation. Bifurcation involves separating questions of patent validity from those of infringement into different proceedings, and is presently used in Germany. Since questions of infringement are generally decided more quickly than questions of invalidity, patentees tend to benefit. If unchecked, however, bifurcation can proliferate forum shopping and greater uncertainty in patent protection. *See, e.g., Benjamin Henrion, EU Patent Plans are a Fuel for Patent Trolls, Says British Telecom, FFII.ORG* (Apr. 27, 2012), <http://press.ffii.org/Press%20releases/EU%20patent%20plans%20are%20a%20fuel%20for%20patent%20trolls%2C%20says%20British%20Telecom?action=print> (on the potential effects of bifurcation on a unitary patent court system).

be addressed in synthesizing a unitary patent system.

*D. A Fragmented Patent System is Detrimental
to the European Economy*

On a fundamental level, the EU exists for three reasons: “to prevent war, to promote political unity, and for economic integration.”⁸⁶ These reasons cannot be considered independently, but rather flow together from the interaction and interests shared amongst the European countries. Based on these precepts, it can be shown that the absence of a unitary patent right in Europe severely damages economic integration, which is central to the EU itself.

First, at the outset, the cost of obtaining community-wide patent protection can be prohibitively high under the present system. Consider, for example, the costs of patent protection in six European countries (Germany, France, Italy, the Netherlands, Switzerland, and the United Kingdom) vis-à-vis the United States. A May 2008 study indicated that the cumulative costs of procedural fees, translation costs, and renewal fees were about €9,000—four to six times more expensive than in the United States.⁸⁷ This inequity is also understated, considering that this comparison substantially under-represents Europe by discounting the lack of patent protection in thirty-two of the thirty-eight countries.⁸⁸ If patent protection were extended to all EPC member states, such protection would cost at least fifteen times more than in the United States.⁸⁹ As a result, even large multinational companies can be disinclined to file patents in many European countries.⁹⁰

The costs of parallel patent litigation are similarly exorbitant. According to a 2009 study, initiating patent litigation proceedings in just four European jurisdictions—Germany, France, the Netherlands, and the United Kingdom—could accrue total costs ranging from €310,000, if the case is resolved at the court of first instance, to €3.6 million if accounting for the cost of appeal.⁹¹ These costs, which can be

86. Bryony Jones, *Why is Unity So Important to Europe?* CNN (Nov. 4, 2011, 12:49 PM), http://www.cnn.com/2011/11/04/world/europe/european-unity-explainer/index.html?hpt=hp_t1.

87. See Mejer, *supra* note 13.

88. Bruno van Pottelsberghe & Jérôme Danguy, *Economic Cost-Benefits Analysis of the Community Patent* 7, EUR. COMM'N (Sept. 7, 2012), http://ec.europa.eu/internal_market/indprop/docs/patent/studies/compact-cost%20-benefit-study-final_en.pdf.

89. *Id.*

90. *Id.*

91. *Id.* at 7.

about twice as high as in the United States, are prohibitive for many individuals and small- and medium-sized companies.⁹² Considering the totality of these factors, it is no surprise that many of these companies decide against pursuing patent protection altogether.⁹³ Without the benefit of patent protection, many of these companies would just as well conduct their business and invest their capital elsewhere.

Second, patent applicants in Europe must tolerate a dimension of uncertainty in patent enforcement that is substantially reduced in markets with integrated patent systems, such as the United States or Japan.⁹⁴ This uncertainty is inherent to litigating patent rights separately in respective member states, since different courts can arrive at contrary conclusions on essentially the same facts.⁹⁵ As in the Euro banknotes case discussed in Part I, a duplicative and internally inconsistent patent system results in legal uncertainty and encourages forum shopping.⁹⁶ This is evidenced by a recent study showing about one thousand infringement cases per year in Germany, about 250 per year in France, about one hundred per year in Italy, about fifty in each of the UK and the Netherlands, with fourteen countries with fewer than ten cases per year, and nine countries with no cases per year.⁹⁷ Forum shopping is undesirable because it leads to a system where the validity, enforceability and scope of patents are unpredictable.⁹⁸ Even setting aside litigation costs, such a system can stall innovation because inventors and capitalists, being uncertain of the metes and bounds of patent protection, operate with reduced confidence that they will recoup expenditures in developing patented inventions.⁹⁹

Third, the present system suffers from the indirect effect of

92. *Id.*

93. Straus, *supra* note 23, at 18.

94. *Id.* at 5.

95. *Id.* at 15.

96. See Begley, *supra* note 64, at 551.

97. Matthias Sontag, *Das EuGH-Gutachten zur Europäischen Patentgerichtsbarkeit – Rückschlag oder Chance?*, (Apr. 13, 2011), available at http://www.duslaw.de/fileadmin/redaktion/Fakultaeten/Juristische_Fakultaet/CIP/Sonntag_EU-Patent.pdf.

98. See, e.g., Michael S. Mireles, Jr., *The United States Patent Reform Quagmire: A Balanced Proposal*, 6 MINN. J.L. SCI. & TECH. 709, 723 (2005) (reviewing ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* (2004) (which describes the marked disparity in attitudes toward patents for different regional circuits in the U.S., and resulting inconsistencies in patent enforcement)).

99. *Id.* at 724.

community-wide exhaustion of patent rights.¹⁰⁰ Patent exhaustion is a loss of patent right that occurs when a patented product is put on the market by the patent owner or with the patent owner's consent.¹⁰¹ The ECJ has held that this patent exhaustion occurs simultaneously across the entire European Community when the patented product is placed in any EU member state.¹⁰² Once the owner's patent rights are so "exhausted," the product can freely circulate throughout the Community and even be re-imported into a country where the product is ostensibly protected by a valid patent.¹⁰³ Without a Community Patent right, a patent owner seeking broad protection faces two unappealing alternatives: incur the inflated costs of obtaining patents in many European countries, or save costs by filing in just a few countries while conceding the right to exclude others from practicing their invention everywhere else.¹⁰⁴ Today, under Community-wide patent exhaustion, a patent owner who decides to compete by placing products within a country without the benefit of patent protection not only faces a potential price war, but also the risk that any products sold will be legally imported into countries where the patent owner already has patent protection.¹⁰⁵

In sum, businesses, particularly small and mid-sized companies, have encountered substantial hardship in enforcing their patents and in defending themselves against unfounded claims and patents that should arguably be revoked.¹⁰⁶ As shown, despite best efforts to liberalize multinational patent enforcement, the lack of a unitary patent right in Europe has resulted in both uncertainty in the value of patent rights and inefficiencies in patent litigation.

III. LEGAL AND PRACTICAL ISSUES FRUSTRATE THE CREATION OF A UNITARY PATENT SYSTEM

With the current economic plight in Europe, the problems highlighted in Part II have brought a sense of urgency for coherent

100. Straus, *supra* note 23, at 8.

101. *Id.* at v.

102. *Id.*

103. *Id.*

104. *See* Mejer, *supra* note 13.

105. Straus, *supra* note 23, at 9.

106. Draft Agreement to a Unified Patent Court, Council of the European Union, 1, Dec. 1153/11 (Jun. 14, 2011), [hereinafter June 2011 Draft Agreement], *available at* [http://documents.epo.org/projects/babylon/eponet.nsf/0/889924E4E28C5D0CC12578D3003F5046/\\$File/st11533_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/889924E4E28C5D0CC12578D3003F5046/$File/st11533_en.pdf).

action by European countries.¹⁰⁷ The Europe 2020 Strategy, for example, specifically identified the need for growth that is sustainable, inclusive, and based on knowledge and innovation.¹⁰⁸ Proponents also argue that the principle of territoriality has shackled progressive patent reform for too long, and that it should give way to the commercial realities of an interconnected world.¹⁰⁹ Yet, such reform should be balanced against EU law, which recognizes the prescriptive interests of the national member states in the European community.¹¹⁰

The European community responded with a resurgence of drafts, revisions, and legal opinions directed to: (1) a unitary patent right, and (2) a dedicated Patent Court to enforce the unitary patent right.¹¹¹ As will be shown, the unitary patent and the Patent Court are closely interdependent. The unitary patent needs a court system to administer cross-border enforcement,¹¹² and the Patent Court needs a legally grounded unitary patent regulation to provide basic rules on jurisdiction and enforcement, as well as provisions for organizing and financing the system.¹¹³

A. The Unitary Patent Regulation Must Harmonize the EPC and the Lisbon Treaty

It may be somewhat surprising that a unitary patent right was envisioned decades ago in Article 142 of the EPC, which allows for a group of contracting states to provide a patent right having “unitary character throughout their territories.”¹¹⁴ Just two years after the signing of the EPC, a unitary patent right formed the basis of a so-called Community Patent Convention, which provided a centralized grant procedure based on a uniform right and conducted in a single

107. European Commission, *EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, at 2, COM (2010) 2020 final (Mar. 3, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

108. *Id.*

109. Dinwoodie, *supra* note 56, at 734.

110. *Id.* at 732.

111. Phil Carey, *Europe's Unified Patent Litigation System Inches Nearer*, WINSTON & STRAWN LLP (Sept. 2011), http://www.winston.com/siteFiles/Publications/The%20European_Unitary_Patent.pdf.

112. See Khurram Aziz, *Council of Europe Forges Ahead with EU Patent Plan Despite Legal Setback*, INTELL. PROP. MAG. (Mar. 10, 2011), <http://www.ipworld.com/ipwo/doc/view.htm?id=264031&searchCode=H>.

113. See, e.g., Unitary Patent/EU Patent News & Issues, EUR. PAT. OFF. (Nov. 10, 2011), <http://www.epo.org/news-issues/issues/eu-patent.html>.

114. EPC, *supra* note 40, art. 142.

language.¹¹⁵ The Community Patent would confer “a protection right with a unitary character which has equal effect throughout the Community and can only be granted, assigned, annulled or extended in respect of the whole of the Community.”¹¹⁶ While this effort was borne amidst hopes that such a harmonized patent right would simplify infringement actions and reduce associated costs, the concept faced substantial challenges, and was never signed.¹¹⁷

Probably the greatest source of frustration in ratifying the unitary patent is the problem of translations.¹¹⁸ For a community with twenty-three official languages, this has historically been a quagmire fraught with administrative and political controversy.¹¹⁹ The dilemma is that full translations are needed (1) to meet the information function of patents and (2) to facilitate local enforcement. Yet providing translations in every country is unworkable from a cost perspective.¹²⁰ A second problem stems from the fact that, while all EU members are also EPC members, the reverse is not true—as of this writing, Switzerland, Liechtenstein, Turkey, Monaco, Iceland, amongst others, are members of the EPC but not the EU.¹²¹ Although a modernized Community Patent Regulation was proposed in 2000, it failed to adequately address either the language issue or the need for a patent judiciary for enforcement, and did not gain traction.¹²²

Notwithstanding these difficulties, it appears that the unitary patent

115. Convention for the European Patent for the Common Market, Dec. 15, 1975, 1976 O.J. (L 17) 43, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1976:017:0043:0043:EN:PDF>; Jorge Cruz, *The Community Patent Convention: What Sort of Future?*, 1 J. WORLD INTELL. PROP. 819, 820–21 (1998).

116. Cruz, *supra* note 115, at 820. The “Community Patent” of 1975 was necessarily enforceable over the entire European “community,” which at the time consisted of only twelve member states. This should be distinguished from the modern Unitary Patent, which may have unitary effect over only a portion of the European community (now known as the European Union). *Id.*

117. *Id.*

118. *Id.* at 824.

119. See *EU Administration – Staff, Languages and Location*, EUROPA, http://europa.eu/about-eu/facts-figures/administration/index_en.htm.

120. See EPC, *supra* note 40, arts. 69, 83, 97(3), 98; Hanns Ullrich, *Harmonizing Patent Law: The Untamable Union Patent* 10, (Max Planck Inst. for Intellectual Prop. & Competition, Law Research Paper No. 12-03, 2012), *available at* <http://ssrn.com/abstract=2027920> (recognizing the problems with inadequate translations and high costs).

121. See *EPO Member States*, *supra* note 52; *The Member Countries of the European Union*, EUROPA, http://europa.eu/about-eu/27-member-countries/index_en.htm. This mismatch is problematic because parties belonging to the EPC but not the EU would not be bound by EU law.

122. Ullrich, *supra* note 120, at 6.

could still become a reality. Recent efforts were guided by a key provision in the Lisbon Treaty that expressly authorizes a unitary patent right.¹²³ Article 118(1) allows the bicameral EU legislature, comprised of the European Parliament and the Council of the European Union (“Council”), to act on legislative proposals by the European Commission (“Commission”) to establish European intellectual property rights “by means of regulations, acting in accordance with ordinary legislative procedure.”¹²⁴ Article 118(2), however, requires that language arrangements would be established under a special legislative procedure by the Council acting unanimously after consulting the European Parliament.¹²⁵ Thus, the translation arrangements for any unitary patent system in the EU must be established by a separate regulation.¹²⁶

Twin regulations directed to the unitary patent and translation arrangements were submitted to the Council in December 2009 and June 2010, respectively.¹²⁷ Despite the best efforts by the Presidency of the Council to broker a deal on translations, talks collapsed¹²⁸ when Spain and Italy objected to any regulation that did not provide for translations into their respective languages.¹²⁹ To overcome this impasse, the Commission submitted a new proposal to the Council to authorize enhanced cooperation, a procedural tool that allows a subset of EU member states to conclude an agreement amongst themselves under certain conditions.¹³⁰ In a major breakthrough, the Council

123. European Commission, *Proposal for a Regulation of the Council and the European Parliament and of the Council Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, & Proposal for a Council Regulation Implementing Enhanced Cooperation in the Area of Unitary Patent Protection with Regard to the Applicable Translation Arrangements – General Approach*, Council Of The European Union, 2, Doc. 11328/11 (June 23, 2011) [hereinafter *Draft Unitary Patent Regulation*], available at <http://register.consilium.europa.eu/pdf/en/11/st11/st11328.en11.pdf>.

124. TFEU, *supra* note 22, art. 188(c).

125. *Id.* art. 118(2).

126. *Draft Unitary Patent Regulation*, *supra* note 123, at 2.

127. *Id.*

128. Press Release, Council European Union, Competitiveness (Internal Market, Industry, Research and Space) (Nov. 10, 2010), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/117687.pdf.

129. Ullrich, *supra* note 120, at 11; see also, *Italy and Spain Block EU-wide Patent Talks*, EURACTIV (Nov. 11, 2010), <http://www.euractiv.com/innovation/italy-and-spain-block-eu-wide-patent-talks-news-499638> (noting that Spain viewed the European Commission’s proposal to limit translations to English, German, and French as discriminatory).

130. Council Decision Authorising Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, Mar. 10, 2011, O.J. L 76/53, art. 1, available at <http://eur->

adopted the proposal in March 2011 and authorized twenty-five of the twenty-seven EU member states (Spain and Italy excluded) to implement enhanced cooperation in the area of unitary patent protection.¹³¹

The current proposal would create a unitary patent, based on Articles 118(1) and 118(2), that operates alongside the current national and European patents and could be filed in any language of the EU. The unitary patent itself, however, would only be granted in one of the three official EU languages (English, German, and French).¹³² During a transitional period, further language translations could be triggered in the event of a dispute and would be paid for by the patent proprietor.¹³³ During this transitional period, machine translations would be aggressively developed with the objective of having, in time, the unitary patent available in the official language for every Member State.¹³⁴ Although Spain and Italy filed complaints with the ECJ challenging the Council's authorization of enhanced cooperation, their resistance appears to have abated somewhat in recent months, leading some to express cautious optimism that one or both countries may soon drop their opposition.¹³⁵

B. A New Patent Court System Must Comply with EU Law

On a second front, efforts were underway to create a patent court vested with the power to enforce a unitary patent right.¹³⁶ The European Patent Litigation Agreement ("EPLA") was a seminal effort. Frustrated

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:076:0053:0055:en:PDF. The invocation of "enhanced cooperation" requires a minimum of nine EU Member States. Its purpose is to overcome a deadlock where a proposal is blocked by the veto of a state or group of states who do not wish to be involved. In order for the use of enhanced cooperation to be approved, all other avenues must have been exhausted, and it must be impossible to attain the objectives in a reasonable period by the EU as a whole. Additionally, enhanced cooperation may not be used to discriminate against Member States and its use must further the objectives of the EU.

131. *Id.*

132. *See* Draft Unitary Patent Regulation, *supra* note 123, at 3, 12.

133. *Id.*

134. *Id.* at 33.

135. *See Italy, Spain Could Drop Opposition to EU Patent*, EURACTIV (Dec. 5, 2011), <http://www.euractiv.com/innovation-enterprise/italy-spain-drop-opposition-eu-patent-news-509433>; Ullrich, *supra* note 120, at 11.

136. *EU – The Future Unified Patent Litigation System in the European Union*, EPLAWPATENTBLOG.COM (Sept. 28, 2011), <http://www.eplawpatentblog.com/eplaw/2011/09/friday-23-september-2011-academy-of-european-laws-conference-the-future-unified-patent-litigation-system-in-the-european-un.html>.

with the stalled efforts at the EU level, a Working Party on Litigation, formed from EPO member states, drafted the EPLA in November 2003.¹³⁷ The agreement would commit its signatory states to an integrated judicial system having a Court of First Instance and Appeal, with a central division and regional divisions.¹³⁸ The agreement also obviated the requirement that states provide translations into their own languages so long as the patent specification was translated into an official EPO language (French, German or English).¹³⁹ However, in 2007, the Legal Service of the European Parliament concluded that the EPLA violated Article 292 of the then-prevailing EU treaty (Maastricht Treaty), since member states would have to contract to form the EPLA outside of EU governance.¹⁴⁰ In hindsight, while the EPLA was ultimately a failure, it identified important legal issues that would shape future proposals.

In 2007, the signing of the Lisbon Treaty breathed new life into the Patent Court project. Based on its interpretation of Article 118, the Commission constructed a draft agreement and statute that contemplated an integrated Patent Court with a Court of First Instance, a Court of Appeal and a Registry.¹⁴¹ Under the agreement, the Patent Court would be common to the contracting member states and have exclusive competence on their territories for both community patents and patents granted under the present EPC regime.¹⁴² The agreement also contained substantive provisions aimed at preventing inconsistent enforcement proceedings between different countries by harmonizing, for example, the definitions of infringing acts and indirect infringement.¹⁴³ The Patent Court could refer questions to the ECJ concerning the interpretation of EU treaties or the validity and interpretation of acts of the institutions of the EU.¹⁴⁴ ECJ decisions would be binding on the Patent Court to the extent that the decision

137. Gary Moss & Matthew Jones, *Patents and Patent Litigation in Europe – Past, Present and Future*, INTELL. PROP. TODAY (June 2011), <http://www.iptoday.com/issues/2011/06/patents-and-patent-litigation-in-europe-past-present-and-future.asp>.

138. *Id.*

139. *Id.*

140. *Id.* (noting Article 292 of the EC Treaty, which recites, “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.”).

141. *EPLA – European Patent Litigation Agreement*, EUR. PAT. OFF. <http://www.epo.org/law-practice/legislative-initiatives/epl.htm> (last updated Apr. 3, 2009).

142. June 2011 Draft Agreement, *supra* note 106, at 4.

143. *Id.*

144. *Id.* at 13.

takes effect in a member state of the EU.¹⁴⁵

The ECJ soon brought down its gavel on the fledgling EPLA. Pursuant to a request by the Council, the ECJ issued a negative opinion in March 2011, stating that the proposal failed to comport with European Union law.¹⁴⁶ According to the ECJ, the proposed Patent Court was “outside the institutional and judicial framework of the European Union” and had “a distinct legal personality under international law.”¹⁴⁷ Because the draft agreement conferred exclusive jurisdiction on the proposed Patent Court, the courts of the member states would have been “divested of that jurisdiction,” and deprived of their power to refer questions to the ECJ in the field of patents.¹⁴⁸ The ECJ concluded by noting that any viable patent system cannot “alter the essential character of the powers conferred on the institutions of the European Union and on the Member States which are indispensable to the preservation of the very nature of European Union law.”¹⁴⁹

Despite the unequivocal setback, proponents of the unitary patent project were undaunted, some even welcoming the points raised as providing “important clarification for the further development of the project.”¹⁵⁰ Three months later, the Hungarian EU Council presidency published a revised version of the draft agreement on what is now known as the “Unified Patent Court” further revised by the Polish Presidency in September 2011.¹⁵¹ The revised draft contained specific provisions to address the ECJ objections, for example: (1) the contracting member states regard the Unified Patent Court to be part of the judicial system of the European Union and subject to the same obligations as a national court with regards to the respect of EU law, and (2) elimination of non-EU member states from the agreement such that the Patent Court is common only to EU member states.¹⁵² A flurry

145. *Id.*

146. Press Release, Court of Justice of the European Union, The Draft Agreement on the Creation of a European and Community Patent Court Not Compatible with European Union Law (Mar. 8, 2011), *available at* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017en.pdf> (reporting on Opinion 1/09 of the Court).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Court of Justice Delivers Opinion on European and EU Patents Court Draft Agreement*, EUR. PAT. OFF. (Mar. 8, 2011), *available at* <http://www.epo.org/news-issues/news/2011/20110308a.html>.

151. Draft Agreement on a Unified Patent Court and Draft Statute – Revised Presidency Text, Council of the European Union, Sept. 2, 2011, Doc. 13751/11.

152. *Id.* at 4.

of subsequent minor revisions culminated in a draft published by the Council in November 2011.¹⁵³

At the time of this writing, it is unclear whether or not the present draft will satisfy the ECJ. However, even if one were to accept these proposals, they raise an important checking question. Does the proposed unitary patent system, as amended, adequately address the fundamental problems that this project was originally intended to solve? To unpack this question, the proposed Patent Court will be juxtaposed with two exemplary judicial systems: (1) the U.S. Federal courts, and (2) the European Community design courts.¹⁵⁴ The sections below will examine differences between these approaches in the particular context of the roles played by the courts, rates of precedential formation, and their resulting effects on quality control and legal certainty.

IV. THE COMMUNITY DESIGN COURTS AND THE U.S. FEDERAL COURTS BOTH IMPLEMENT A UNITARY PATENT SYSTEM, BUT THE FORMER PROVIDES SUPERIOR QUALITY CONTROL

The U.S. Federal courts are an independent national judiciary with jurisdiction over cases involving the laws and treaties of the United States, including patent law.¹⁵⁵ The European Community design courts (“Community design courts”) are courts whose jurisdiction is confined to issues of infringement and invalidity for Community designs.¹⁵⁶ Although both courts enforce a unitary intellectual property right, the U.S. courts of first instance are generalist courts while the Community design courts are specialized. As will be shown, this distinction is significant because the limited jurisdiction of the latter tends to promote greater legal certainty in enforcement. Accordingly, the Community

153. Doc. 16741/11, Working Document, Draft Agreement on a Unified Patent Court and Draft Statute – Revised Presidency Text, Council of the European Union (Nov. 11, 2011) [hereinafter November 2011 Draft Agreement], <http://register.consilium.europa.eu/pdf/en/11/st16/st16741.en11.pdf>. Articles revised in this draft include Articles 18 (budget); 19 (financing); 58 (transitional period); 58a (ratification, depositing and notification); 58d (revision); and 59 (entry into force).

154. It is undeniable that there are fundamental technical differences between Community designs and patents; notwithstanding, this Note postulates that the foundation of the court system used for Community Designs can nonetheless provide guiding principles that could inform the creation of an effective patent court system.

155. See *Jurisdiction of the Federal Courts*, U.S. CTS. (Feb. 16, 2012), <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction.aspx> [hereinafter *Federal Court Jurisdiction*].

156. See *Judgments of the Community Design Courts*, OFF. HARMONIZATION INT. MKT. (Mar. 14, 2011), <http://oami.europa.eu/ows/rw/pages/RCD/caseLaw/judgementsCDCourts.en.do>.

design approach is better situated to achieve the goals of a unitary patent system, although compliance with EU law would require further modifications to this system.

A. The U.S. Federal Court Model Achieves a Unified System but Encourages Forum Shopping

The current U.S. patent litigation regime provides a useful parallel model for analyzing the merits of litigating a unitary patent in the national courts of European member states. Under the U.S. model, federal district courts are the courts of first instance for cases involving laws of the United States, including patent cases.¹⁵⁷ In patent cases, district court appeals go to the Court of Appeals for the Federal Circuit ("CAFC"), an appellate court with nationwide jurisdiction in enumerated subject areas.¹⁵⁸ Intellectual property cases comprise about 30% of CAFC cases, nearly all of them involving patents.¹⁵⁹ Because the CAFC has exclusive jurisdiction over appeals from U.S. district courts concerning matters of patent law, it provides a check on these courts.¹⁶⁰

Established in 1982, the CAFC was commissioned "to promote greater uniformity in certain areas of federal jurisdiction and relieve the pressure on the dockets of the Supreme Court and the Courts of Appeals for the regional circuits."¹⁶¹ In part, this court eliminates some "inconsistencies in the application and interpretation of patent law across federal courts."¹⁶² The CAFC role in harmonizing patent law across the federal court system may be partially reflected in an increase in settlement rates associated with patent cases, because harmonization inherently increases legal certainty, which in turn reduces the need for litigation.¹⁶³ For example, following the establishment of the CAFC, the

157. See *Jurisdiction of the Federal Courts*, *supra* note 155.

158. *Court Jurisdiction*, U.S. CT. APPEALS FED. CIR., <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited Oct. 6, 2012) (listing the enumerated subject areas, which include international trade, government contracts, patents, trademarks, some money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims).

159. *Id.*

160. Federal Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

161. Fed. Jud. Center, *Landmark Judicial Legislation*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_22.html.

162. Scott E. Atkinson, Alan C. Marco, & John L. Turner, *The Economics of a Centralized Judiciary, Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 441 (Aug. 2009) [hereinafter *The Economics of a Centralized Judiciary*].

163. Alberto Galasso & Mark A. Schankerman, *Patent Thickets and the Market for Innovation: Evidence from Settlement of Patent Disputes*, 28 CENTRE FOR ECON. POL'Y RES.,

time for arriving at a settlement decreased by 7.8 months (which is, depending on the type of patent involved, roughly one third to one half of the *ex ante* settlement time).¹⁶⁴

One way to measure the quality, and associated credibility, of a court is to examine the rate at which the rulings of that court are reversed on appeal.¹⁶⁵ By this metric, the high rate of reversals by the CAFC of district court decisions on the construction of patent claims may be cause for concern.¹⁶⁶ A recent study reported that the CAFC reversed on the basis of erroneous claim construction about forty percent of the time, even as its overall reversal rate ranged from eleven to fourteen percent.¹⁶⁷ Reversal rates are meaningful, particularly when comparing the merits of different judicial approaches, because a high likelihood of reversal adds uncertainty in patent litigation.¹⁶⁸ Mindful that patent law operates within commercial law, such legal uncertainty not only contravenes a stated object of the unitary patent system, but also chills the business activity of patent practitioners and potential infringers alike, which rely on certainty over claim scope to make timely business decisions.¹⁶⁹

A factor contributing to this problem may be the lack of judicial precedent in most U.S. district courts.¹⁷⁰ For example, in the twelve-month period ending September 30, 2010, there were about 361 thousand total civil and criminal filings across the United States, and

Discussion Paper No. 6946 (2008), available at <http://ssrn.com/abstract=1401775> (modeling that the introduction of CAFC resulted in a direct and large reduction on the duration of disputes because of less uncertainty about the outcome if the dispute goes to trial).

164. *Id.* at 20–21.

165. See James F. Holderman & Halley Guren, *The Patent Litigation Predicament in the United States*, 1 U. ILL. J.L. TECH. & POL'Y 101, 103 (2007), available at <http://www.jltp.uiuc.edu/archives/holderman.pdf> (on the ramifications of high reversal rates, namely the erosion of trust in the lower court claim construction rulings and reluctance of disappointed litigants to settle).

166. See *id.*

167. See *id.*; Appeals Filed, Terminated, and Pending, U.S. CT. APPEALS FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/statistics.html> (last visited Oct. 6, 2012).

168. See *id.* (showing that over the 12-month period ending September 30 of each year from 2006–2011, the percentages of CAFC cases terminating in a reversal were 12%, 14%, 13%, 11%, 12%, and 13%, respectively).

169. See Holderman & Guren, *supra* note 165, at 102; Kimberly A. Moore, *Forum Shopping In Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C.L. REV. 889, 927 (2001).

170. See September 2011 Draft Agreement, *supra* note 146, at 7; Galasso & Schankerman, *supra* note 163, at 1 (noting that, in patent disputes, delay and uncertainty in the settlement and licensing process mean slower diffusion of patented technology).

170. See Holderman & Guren, *supra* note 165, at 104–05.

less than one percent (i.e., about 3,300) of those cases involved patents.¹⁷¹ The lack of subject matter specialization is noteworthy, since U.S. district court judges deal with a large and diverse caseload and typically do not concentrate on staying abreast of the changing nuances of any one area of the law, such as patent law.¹⁷² Some have surmised that the large caseload confronting district court judges may be further exacerbating the problem.¹⁷³

A related problem with the U.S. approach is that different courts of first instance use different judicial procedures, resulting in considerable variation in speeds of adjudication and patentee win rates from district to district.¹⁷⁴ These factors provide strong incentives for forum shopping, even in the integrated U.S. patent system.¹⁷⁵ For example, the U.S. District Court for the Eastern District of Texas in Marshall, Texas has long been a popular forum for patent lawsuits, since it found in favor of the plaintiff seventy-eight percent of the time, compared to a national average of fifty-nine percent.¹⁷⁶ Even when the merits favor the defendant in a patent case, a strongly pro-plaintiff forum can put great pressure on the defendant to settle matters quickly and privately.¹⁷⁷ Such an outcome would be contrary to the goals of the unitary patent Regulation and Patent Court agreement, namely providing a patent with unitary character and providing “uniform protection,” with “equal effect in all participating Member States.”¹⁷⁸

B. The Community Design Model Improves upon the U.S. Model by Promoting Legal Certainty

Turning now to the Community design regime, it is interesting to note that Europe has already set a legal precedent for integrating European intellectual property rights through EU institutions. For

171. See Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics, Tables C-2A & D-2 (2006–11) [hereinafter U.S. Caseload Statistics] (reporting the statistics for U.S. District Court cases commenced during the 12-month periods ending September 30 of each year from 2006–2010 as follows (patent cases/total cases): 2830/325,906 (0.87%); 2896/325,417 (0.89%); 2909/337,686 (0.86%); 2792/352,619 (0.79%); and 3301/360,908 (0.91%)).

172. See Holderman & Guren, *supra* note 165, at 104.

173. *Id.*

174. See Moore, *supra* note 168, at 908–09, 916–23.

175. *Id.* at 892.

176. Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), <http://select.nytimes.com/gst/abstract.html?res=F60E10FC35550C778EDDA00894DE404482>.

177. *Id.*

178. Draft Unitary Patent Regulation, *supra* note 123, at 15.

example, in 1995, Community legislation established the Community Plant Variety Office to protect a unitary plant variety right throughout Europe.¹⁷⁹ This was followed shortly thereafter by the Community Trademark in 1996.¹⁸⁰ Administered by the Office for Harmonization in the Internal Market, a EU agency, this trademark right also enjoys Community-wide effect.¹⁸¹ The Community design came into being soon after.

The Community design bears some similarities to both patents and trademarks. Like patents, the design is a form of intellectual property.¹⁸² Legally, the design represents the outward appearance of a product or part of it, resulting from the lines, contours, colors, shape, texture, materials, and/or ornamentation.¹⁸³ An application to register a Community design requires a request for registration, information identifying the applicant and a representation of a design, typically based on one or more illustrations.¹⁸⁴ To be valid, a Community design must be novel and have “individual character.”¹⁸⁵ Unlike patent applications, however, designs are only examined for compliance with formalities; no substantive search is conducted at the time of application.¹⁸⁶ Designs also differ from patent rights in that they cover the appearance of a product, rather than its function.¹⁸⁷ Designs have emerged as an established component in the portfolio of major industries, such as clothing, automobiles, jewelry, and furniture.¹⁸⁸

179. See *The Mission of the CVPO*, CMTY. PLANT VARIETY OFF, <http://www.cpvo.europa.eu/main/en/home/about-the-cpvo/its-mission> (last visited Oct. 6, 2012); see also Council Regulation (EC) On Community Plant Variety Rights, July 27, 1994, 1994 O.C. (L 227) 1 (governing the system of Community plant variety protection).

180. See Timothy W. Blakely, *Beyond The International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection*, 149 U. PA. L. REV. 309, 338 (2000).

181. See *id.* at 338–39.

182. *What Is a Design?*, OFF. FOR HARMONIZATION IN THE INT. MKT. (May 28, 2008), <http://oami.europa.eu/ows/rw/pages/RCD/design.en.do> [hereinafter OHIM].

183. *Id.*

184. *Guidelines for the Examination of Community Designs*, OFF. FOR HARMONIZATION INT. MKT. 4 (Aug. 7, 2008), <http://oami.europa.eu/ows/rw/pages/RCD/legalReferences/guidelines.en/office/aspects/pdf/ExamGuidelines.pdf.do>.

185. *Examination Guidelines Community Design*, OFF. FOR HARMONIZATION INT. MKT. 8 (Aug. 7, 2008), http://oami.europa.eu/en/design/pdf/guidelines_inv.pdf.

186. OHIM, *supra* note 182.

187. *Id.*

188. Christopher M. Aide, *The Community Design: European Union-Wide Protection for Your Design Portfolio*, 1 NW. J. TECH. & INTELL. PROP. 35, 35 (2003).

In 2001, the Council of the EU promulgated by regulation “a unified system for obtaining a Community design to which uniform protection is given with uniform effect throughout the entire territory of the Community.”¹⁸⁹ The Community design system also addresses problems that are common to those of the unitary patent, including differences between laws of member states which prevent and distort Community-wide competition, and divisions of the internal market that pose obstacles to the free movement of goods.¹⁹⁰

Under the Community design regime, and unlike the U.S. model, the existing national courts do not adjudicate on design matters; instead, member states designate in their territories a limited number of national courts and tribunals of first and second instance (Community design courts) that perform the functions assigned to them.¹⁹¹ These Community design courts have exclusive jurisdiction for matters of infringement and invalidity of Community designs.¹⁹² These courts have the power to impose both injunctions and damages that have effect throughout the EU.¹⁹³

The designation of a specialized court has several important consequences. Recall that only a small fraction of cases heard by U.S. district courts each year are patent cases.¹⁹⁴ By comparison, all of the cases heard in Community design courts involve Community designs. It can be inferred that, between the two court systems, the Community design courts will have a much richer body of precedent, since a specialized court will generally hear the same legal issue at a considerably higher rate than a non-specialized court.¹⁹⁵ Second, it can be inferred that judges sitting on a specialized court will have greater exposure and opportunity to develop expertise required to properly adjudicate the legal issues at hand, leading to a higher degree of

189. Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, Dec. 12, 2001, 2001 O.J. (L 3) 1 [hereinafter Community Design Regulation], available at http://oami.europa.eu/ows/rw/resource/documents/RCD/regulations/62002_en_cv.pdf (later amended by Council Regulation (EC) No 1891/2006 of 18 December 2006 Amending Regulations (EC) No 6/2002 and (EC) No 40/94 to Give Effect to the Accession of the European Community to the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (2006 O.J. (L 386) 14)).

190. *Id.*

191. Community Design Regulation, *supra* note 189, art. 80.

192. See *Judgments of the Community Design Courts*, OHIM (Mar. 14, 2011), <http://oami.europa.eu/ows/rw/pages/RCD/caseLaw/judgementsCDCCourts.en.do>.

193. Aide, *supra* note 188, at 41.

194. U.S. Caseload Statistics, *supra* note 171.

195. *Id.*

consistency and predictability.¹⁹⁶

Assuming that a court's reversal rate on appeal is probative of its perceived quality and credibility,¹⁹⁷ empirical data indeed corroborates the virtues of a specialized court. Compared with the U.S. district courts, whose rulings on patent claims were reversed about forty percent of the time, the reversal rates for decisions by Community design courts of first instance were, on average, only seventeen percent for ex parte decisions and twenty-eight percent for inter partes decisions over the last five years—a telling statistic that favors the Community design approach.¹⁹⁸ Some might attribute this difference to the intrinsic differences between patents and designs.¹⁹⁹ Yet, court statistics exclusive to the U.S. patent regime also bolster this conclusion. For example, after the United States established the CAFC following a period of fragmented patent rights, the average settlement delay in patent litigation fell by a statistically significant difference.²⁰⁰ These numbers strongly indicate the benefits of a specialized court in providing a predictable legal outcome.

C. A Modified Community Design Approach Would Provide a Viable Solution in Europe

The September 2011 draft Patent Court agreement and statute, in conjunction with the current unitary patent Regulation, essentially elected the Community design approach over the U.S. model, most

196. *See id.*

197. Holderman & Guren, *supra* note 165, at 102.

198. *See* Statistics, Office for Harmonization in the Internet Mkt. (last visited Dec. 7, 2011), <http://oami.europa.eu/ows/rw/pages/OHIM/statistics.en.do> (reporting reversal rates of first instance decisions over the years 2007–2011 as follows: 13.7%, 15.7%, 16.1%, 19.8%, and 17.9% for ex parte decisions, respectively, and 26.5%, 28.6%, 30.2%, 28.9%, and 26.1%, for inter partes decisions, respectively).

199. *See* Winfried Tilmann, *Moving Towards Completing the European Patent System – Overview over the Draft Agreement on a European and EU Patent Court (EEUPC)*, 4–5 (Sept. 23, 2011), available at <http://www.eplawpatentblog.com/2011/September/EU%20Patent%20System%20WarsawSpeech9.9.pdf>.

200. *See, e.g.*, Holderman, *supra* note 165, at 105–06 (describing how judges trained as generalists, who lack a technical background, are often drawn to the wrong conclusion in patent cases); Galasso, *supra* note 163, at 19 (notably, this increased certainty was found, in no small part, to be attributable to a pro-patent bias on the part of the CAFC); *See also* Clifton Brown, Federal Circuit Tackles Increasingly Complicated Case Load, *CORP. LEGAL TIMES*, 28 (Oct. 28, 2000), at 28 (commenting that the CAFC has evolved from being mostly concerned with personnel issues to one dominated by highly technical patent cases).

significantly in the structure of its courts of first instance.²⁰¹ For example, like the Community design courts, the proposed Patent Court would be common to the Contracting Member States, yet it would be treated vis-à-vis the ECJ as a national court for which the member states are responsible.²⁰² Also similar to Community design courts, the proposed Patent Courts would be specialized in matters of patent law and be composed of judges who are both legally and technically qualified.²⁰³

The proposed Patent Court framework raises a jurisdictional issue reminiscent of *Roche* and *GAT*.²⁰⁴ The new Patent Court would deviate from the Brussels I Regulation's basic principle that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of nationality.²⁰⁵ The new Patent Court, which has a legal personality distinct from the national courts, should be harmonized with this principle.²⁰⁶ This issue could be resolved by naming the new Patent Court in the Brussels I Regulation as the national court of each state participating in the Patent Court Agreement.²⁰⁷

There are other important structural differences, setting the proposed Patent Court apart from either of the aforementioned judicial systems.²⁰⁸ One major difference relates to the competence and role of the ECJ in the work of the specialized court.²⁰⁹ For example, the decisions of Community design courts can be brought before the ECJ

201. See Tilmann, *supra* note 199, at 1.

202. *Id.*

203. November 2011 Draft Agreement, *supra* note 153, at 12. Art. 10, for instance, requires that the Court comprise both legally qualified judges and technically qualified judges, where technically qualified judges shall have a university degree and proven expertise in a field of technology, along with proven knowledge of civil law and procedure. *Id.*

204. See *supra* Part II.

205. Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1 (EC). 205. See also Tilmann, *supra* note 199.

206. Tilmann, *supra* note 199, at 2.

207. *Id.*

208. *Id.* The controversial involvement of the ECJ in the Patent Court results from harmonizing the EPC with the EU treaties. Here, the drafters of the Unitary Patent Regulation deemed it necessary to provide for sanctions in the Regulation, thus making at least some substantive patent law part of EU law. This, in turn, allows the Regulation to make use of Article 118 TFEU, which provides a legal basis for "measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights." Failure to include a sanction in the Regulation would risk a ruling by the ECJ that the Regulation is invalid because of improper application of Article 118.

209. *Id.* at 4.

following a decision by the Board of Appeal, with the ECJ having full jurisdiction “to annul or alter the contested decision.”²¹⁰ On the other hand, the competence of the ECJ would be uniquely tailored under the proposed Patent Court system, since the Patent Court would be adjudicating rules under the EPC to which the ECJ does not adhere, including questions of patentability and revocation.²¹¹ The ECJ would, however, be competent to rule on matters of injunctions and limitations thereof as contained in Article 3(2) of the proposed unitary patent Regulation.²¹² While there has been vociferous debate over the extent of ECJ involvement, particularly as to Articles 6 through 8 of the proposed Regulation, the ECJ would, in theory, play a fairly limited role in adjudicating technical matters in patent law, with the brunt of the work being borne by the Patent Court.²¹³

Based on the latest draft of the Patent Court agreement, the Patent Court would also differ from U.S. courts and Community design courts in its unique multinational court composition.²¹⁴ Under the agreement, a local division panel would include at least one permanent legally qualified judge who is a national of the contracting member state hosting the local division, and at least one judge from an international “pool” of judges.²¹⁵ Article 5 further promotes the internationality of the court—for a local division to be set up in a member state, over one hundred patent cases per year must be commenced in that member state in three successive years prior to or subsequent to the date of entry into force.²¹⁶ If individual member states cannot meet this condition, the agreement provides for regional divisions, which also have multinational composition and are shared by two or more member states.²¹⁷ The international character of the Patent Court is significant because judges can benefit from cross-border interaction between

210. Community Design Regulation, *supra* note 188, art. 61.

211. Tilmann, *supra* note 199, at 4.

212. Draft Unitary Patent Regulation, *supra* note 123, at 15. Article 3(2) provides: “A European patent with unitary effect shall have a unitary character. It shall provide uniform protection and shall have equal effect in all participating Member States...” Without prejudice to Article 5, a European patent with unitary effect may only be limited, licensed, transferred, revoked or lapse in respect of all the participating Member States. *Id.*

213. Tilmann, *supra* note 199, at 4; *see also* Annsley Merelle Ward, *Are EU Ministers Driving US Towards A European Patent Disaster?* IPKAT (Dec. 5, 2011), <http://ipkitten.blogspot.com/2011/12/good-morning-from-amerikat-monday-is.html>.

214. November 2011 Draft Agreement, *supra* note 153, art. 6.

215. *Id.*

216. *Id.* art 5.

217. *Id.*

similarly situated professionals, judges, administrators, and lawyers.²¹⁸ Such conversations, in turn, can lead to “soft” harmonization, inculcated by the socially driven convergence of ideas instead of being imposed by the rule of law.²¹⁹

Indeed, the greatest problem faced by the unitary patent may not be legal, but, rather, practical in nature. For the unitary patent to be considered a long-term success, it must attract the interest of patent proprietors who might otherwise be reasonably happy with the status quo.²²⁰ There are palpable reasons for why a proprietor would be reluctant to embrace the unitary patent. Change begets uncertainty, and the specter of a Community-wide revocation by a rogue court in a distant member state could give pause to those considering sweeping changes to their intellectual property policy.²²¹ Patent enforcement is also rife with language issues, including questions of the operational language of the division, proceedings, court documents and judgments.²²² Some member states have raised legitimate concerns that their nationals may not be able to use their own language in the proposed Patent Court, or that judgments may not be available in their native language.²²³ Finally, the costs related to the complex language requirements and operations of the Patent Court are also largely uncertain.²²⁴ With these risks, even diversified multinational companies may adopt a “wait and see” approach before including unitary patents in their portfolios.

For all of these reasons, it is of paramount importance that the unitary patent is of utmost quality. The need to empower the EPO and the proposed Patent Court to provide adequate quality control for the unitary patent *cannot be understated* because its success ultimately rests on a cost-benefit calculation by those seeking patent protection.²²⁵ In

218. Dinwoodie, *supra* note 56, at 798.

219. *Id.*

220. See Herbert Smith, *ECJ Rejects the Latest Pan-European Patent Litigation Proposals, but the Council Authorizes Use of the Cooperation of a Community Patent*, HERBERT SMITH LLP (Mar. 10, 2011), <http://www.herbertsmith.com/NR/rdonlyres/A9A22D33-5ABB-4D6F-B48B-03856E147156/0/020110310ECJrejectslatestUPLSSebastianMooreandRachelMontagnon.html>.

221. See Aziz, *supra* note 112.

222. European Scrutiny Comm., *Draft Agreement on a Unified Patent Court and Draft Statute*, § 2.1 (Dec. 20, 2011), available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xlv/42804.htm>.

223. *Id.*

224. *Id.*

225. Cf. Mark Shiqian Zhai, *The Chinese Utility Model Patent is Destroying Innovation in China*, 39 AIPLA Q.J. 413, 427 (2011) (while the cited cost-benefit analysis relates to utility

this analysis, patent-seekers weigh the unitary patent against its alternatives, including the currently existing European and National patents.²²⁶ The patent-seeker balances the costs of obtaining a patent with later-arising transaction costs, including: (1) uncertainties in patent protection, (2) litigation inefficiency, and (3) licensing transaction costs.²²⁷ As will be shown, these costs are directly or indirectly dependent on the quality of the patents granted and the quality of their enforcement.

First, some patent protection transaction costs derive from the risk of the EPO granting an overbroad patent claim or the Patent Court making inconsistent rulings. In this respect, the proposed unitary patent is primed for success. The EPO is the logical choice to administer the unitary patent, given its successful track record, dating back to 1973, as the granting authority for European patents under the EPC.²²⁸ The proposed Regulation wisely leverages existing infrastructure for patent prosecution, while preserving post-grant EPO procedures such as limitation, revocation, and opposition proceedings, with appeals going to the Boards of Appeal.²²⁹ As to enforcement, the Patent Court, with its patent-specialized judges, should be well situated to provide increased certainty in claim construction and enhance public confidence in the unitary patent.²³⁰ There will be, no doubt, some degree of uncertainty during an adjustment period establishing any new court system. Costs associated thereof will offset, to some degree, the benefits of the Patent Court, but these are short-term issues that will dissipate over time.

Second, the EPO/Patent Court plays a role in maintaining litigation efficiency.²³¹ It is not surprising that litigation efficiency directly correlates with legal certainty, since certainty over patent validity and claim scope facilitates negotiation between litigants, settlement of

models, a similar analysis would apply to patents).

226. *Id.*

227. *Id.*

228. Straus, *supra* note 23, at 10.

229. Unitary patent/EU patent, *supra* note 113.

230. November 2011 Draft Agreement, *supra* note 153, at 3.

231. Annsley Merelle Ward, *RECAP & UPDATE: the Unitary Patent System and Unified Patent Court*, THE IPKAT (Dec. 20, 2011), <http://ipkitten.blogspot.com/2011/12/recap-update-unitary-patent-system-and.html> (arguing for a minimal role of the ECJ in the Patent Court under the premise that the consequential delays, uncertainty and substantive patent law being interpreted by an unspecialized judiciary would defeat the system that the unitary patent system was intended to create).

certain issues, and appropriate tailoring of other issues.²³² Accordingly, high-quality examinations of patent claims, both by the EPO and the Patent Court, are essential to providing a strong presumption of patent validity and minimizing litigation over questionable patent claims.²³³ Reducing litigation time, in turn, will decrease transaction costs between negotiating parties in patent infringement disputes.²³⁴

Finally, transaction costs take the form of clearance costs imposed on commercial activity. A company planning to do business in a given member state will need to conduct a thorough search of applicable, granted European and unitary patents in case licenses are required to practice its business.²³⁵ Questionable patent rights cannot be easily valued and they erode efficiency of the market for licensing patents, eventually impacting the cross-fertilization of technology between small and medium-sized entities that specialize in radical innovation, and large companies that develop, produce, and market those innovations.²³⁶ As before, a specialized Patent Court is more likely to arrive at consistent outcomes from one member state to another than a non-specialized court.

Transactional costs must therefore be kept under control to provide an affordable system and encourage widespread acceptance of the unitary patent by multinational companies, as well as small and medium-sized entities.²³⁷ Acceptance of the unitary patent by patent proprietors will generate fee revenue, thereby defraying the incremental costs incurred by the EPO in processing unitary patent applications, collecting renewal fees, maintaining a registry, and managing the compensation system for translation costs.²³⁸ Just as importantly,

232. See Zhai, *supra* note 225, at 427.

233. *Id.* at 428.

234. Galasso & Schankerman, *supra* note 163, at 1.

235. Zhai, *supra* note 225, at 428.

236. Galasso & Schankerman, *supra* note 163, at 1 (describing the importance of patent transactions in high technology areas).

237. See Straus, *supra* note 23.

238. Benoît Battistelli, Address at the European Parliament Committee on Legal Affairs Hearing: On the Threshold of Unitary Patent Protection in Europe (Oct. 11, 2011), <http://www.epo.org/news-issues/press/speeches/20111011.html>. [hereinafter Battistelli Address]. While translation costs may be considerable in the short term, Article 6 of the proposed Unitary Patent Regulation provides for transitional measures to be applied during a certain period, before a system of high quality machine translations into all official languages of the Union becomes available. Recently, the EPO has reported progress on a machine translation program that is expected, by 2014, to provide translations from English, French and German into 28 European languages plus Chinese, Japanese, Korean and Russian. Technology could thus drive down translation costs significantly over time.

successful outcomes will encourage the future participation of member states not initially part of the unitary patent project.²³⁹

V. THE PROPOSED PATENT COURT AGREEMENT HARMONIZES THE EPC AND EU LAW, BUT ITS LONG-TERM SUCCESS REQUIRES TRUST BETWEEN THE PATENT COURT AND THE ECJ

Opponents of the unitary patent project have seized on the ECJ ruling to urge that the unitary patent should not involve the EPO and instead be fully administered within EU institutions.²⁴⁰ An opposite tack was taken by proponents of the unitary patent, who have argued that the Regulation should be re-crafted to curtail ECJ involvement in substantive matters of the Patent Court.²⁴¹ This Note advances the opinion that both of these viewpoints are mistaken, and the proposed unitary patent Regulation and Patent Court agreement are in full compliance with EU law.

A. *The Lisbon Treaty Contemplates Administration and Enforcement of the Unitary Patent by Non-EU Institutions*

One vocal critic of the proposed Regulation and Patent Court agreement is April, a French advocacy association devoted to promoting a democratic innovation policy in Europe.²⁴² April argues that the March 2011 ECJ opinion plainly demonstrates that (1) patent-related litigation must be dealt with by national courts in each member state, and (2) the primacy of EU law is incompatible with non-EU institutions ruling on matters that affect the fundamental rights of European citizens.²⁴³ Each of these points will be examined in turn.

The first issue is jurisdictional. In the ECJ opinion, the court held that “since that jurisdiction [to rule on direct actions between individuals in the field of patents] is held by the courts of the Member States . . . the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement.”²⁴⁴

239. Battistelli Address, *supra* note 238.

240. Jeanne Tadeusz, *Analysis of the Opinion From the European Court of Justice on the Unified Patent Court* (Mar. 11, 2011, 12:33 PM), <http://www.april.org/en/print/14866>.

241. See Ward, *supra* note 213.

242. See *Introducing April*, APRIL (Sept. 25, 2008), <http://www.april.org/en/introducing-april>.

243. Tadeusz, *supra* note 240.

244. Case C-1/09, Opinion Pursuant to Article 218(11) TFEU, 2011 E.C.R. I-1, I-18 [hereinafter March 2011 ECJ Opinion], available at <http://www.ipeg.eu/wp-content/uploads/Opinion-of-the-European-Court-of-Justice-on-EU-Patent-March-8->

Since this reasoning was based on Article 267 of the Lisbon Treaty, concerning preliminary rulings by the ECJ, the question of jurisdiction turns on whether the courts in the current Patent Court agreement constitute courts “of the Member States” according to the purview of Article 267.²⁴⁵ The following two cases illuminate this issue.

In *Parfums Christian Dior v. Evora*, decided in 1997, Parfums Christian Dior SA and Parfums Christian Dior BV (collectively, “Dior”) filed an infringement action against Evora BV (“Evora”) in a district court of the Netherlands for using Dior’s trademarks to market perfume products.²⁴⁶ While the district court granted Dior’s application, Evora appealed to the Regional Court in Amsterdam, which reversed.²⁴⁷ After another appeal, the Supreme Court of the Netherlands stayed the proceedings and requested clarification from the ECJ as to what constitutes a “court or tribunal of the Member State against whose decisions there is no remedy under national law,” under Article 177 of the EC Treaty (the predecessor to Article 267 TFEU).²⁴⁸ Citing the establishment of the tri-national Benelux Court of Justice in 1975, the ECJ held that “[t]here is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.”²⁴⁹ According to the ECJ, “[t]o allow a court . . . faced with the task of interpreting Community rules in the performance of its function, to follow the procedure provided for by Article 177 of the Treaty would therefore serve the purpose of that provision, which is to ensure the uniform interpretation of Community law.”²⁵⁰

This ruling was recently qualified by a 2011 case, *Miles v.*

2011_C1_09EN.pdf.

245. See TFEU, *supra* note 22, art. 267.

246. Case C-337/95, *Parfums Christian Dior v. Evora*, 1997 E.C.R. I-6013, I-6036–38, available at <http://0-www.heinonline.org.lucy.lls.edu/HOL/Page?handle=hein.intyb/rcbjcofi0082&id=9&collection=intyb&index=intyb/rcbjcofi>.

247. *Id.* at I-6038.

248. *Id.* at I-6039–40; see also Treaty of Rome, *supra* note 20, art. 177; TFEU, *supra* note 22, art. 267.

249. *Id.* ¶ 21 (the Benelux Court is an instrument of the Benelux Economic Union created by the Benelux Treaty of 1958 to foster economic cooperation between Belgium, Luxembourg, and the Netherlands. The Benelux Court helps promote uniformity in the application of rules of law common to Belgium, Luxembourg, and the Netherlands by way of preliminary ruling, and has jurisdiction in administrative cases. See Benelux CJ – Court Of Justice of the Benelux Economic Union, PICT-PCTI (last visited Feb. 25, 2012), <http://www.pict-pecti.org/courts/beneluxCJ.html>).

250. *Id.* ¶ 23.

European Schools, in which a group of teachers filed suit against the European schools because the schools refused to adjust their remuneration following depreciation of the pound sterling against other currencies.²⁵¹ The European Schools' Convention, upon which the schools were based, provided a Complaints Board ("Board") with "sole jurisdiction in the first and final instance . . . in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it."²⁵² The Board stayed the proceedings and referred a threshold question to the ECJ: Is the Board, being common to the member states but not falling directly within the authority of any particular member state, competent to refer questions to the ECJ?²⁵³ The ECJ answered in the negative, ruling that while the Board was a "court or tribunal" within the meaning of Article 267, it does not have judicial links with the judicial systems of the member states and thus should not be able to submit questions to the Court of Justice.²⁵⁴

Here, the proposed Patent Court agreement provides for a court system with jurisdiction over all contracting member states of the agreement in matters concerning unitary patents.²⁵⁵ As indicated in the draft agreement, the Patent Court should be considered competent to ask preliminary questions on the basis of Article 267 TFEU now that (1) non-EU member states have been removed from the agreement and (2) the Patent Court is common only to the member states of the agreement.²⁵⁶ Like the Benelux Court in *Dior*, the Patent Court is "common to a number of member states," and thus should be competent to refer questions to the ECJ "in the same way as courts or tribunals of those member states."²⁵⁷

Under the latest revision of the proposed Patent Court agreement, the Patent Court also should not be restricted under the purview of the *Miles* case, because the Patent Court has at least one judicial link with the national courts under the proposed Patent Court agreement.²⁵⁸ For

251. See Case C-196/09, *Paul Miles v. European Schools*, 2011 E.C.R. I-0000, ¶ 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0196:EN:HTML>.

252. *Id.* ¶ 8.

253. *Id.* ¶ 30–31.

254. *Id.* ¶ 41.

255. See November 2011 Draft Agreement, *supra* note 153, at 4.

256. *Id.*

257. *Id.*

258. *Id.* at 5.

example, Article 14c of the draft agreement expressly provides that “Contracting Member States are jointly and severally liable for damages . . . resulting from an infringement of Union law by the Court of Appeal,” and that “[a]ny action seeking compensation for such damage shall be brought against the Contracting Member State where the claimant is domiciled *before the competent court of that Contracting State* (emphasis added).”²⁵⁹ Since the national courts of the contracting member states would decide issues of infringement of Union law by the Patent Court, the Patent Court should be competent under Article 267 to refer questions to the ECJ.²⁶⁰

The second question concerns the involvement of the EPO, a non-EU institution, in administering the unitary patent. Critics such as April have characterized the EPO as an unchecked, “anti-democratic” institution whose proposed role would be contrary to EU law.²⁶¹ These objections are without merit. Whether the EPO can administer the unitary patent is a legal question that essentially rests on the compliance of the unitary patent Regulation with Article 118 of the Lisbon Treaty.²⁶² Article 97a states the following:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised [sic] Union-wide authorisation [sic], coordination and supervision arrangements.²⁶³

On its face, there is nothing in the above text that limits the “creation of the European intellectual property rights” to EU institutions. Moreover, no such limitation can be implied based on the intent of the framers of the Lisbon Treaty, because the framers would have had full knowledge of the EPC and the central role of the EPO since the signing of the European Patent Convention in 1973.²⁶⁴ The negative opinion of the Legal Service of the European Parliament

259. *Id.* art. 14(c). Article 14(c) further provides that where the claimant is not domiciled in a Contracting Member State, it may bring such an action against the Contracting Member State where the Court of Appeal has its seat, before the competent court of that Contracting Member State. *Id.*

260. *Id.* at 5.

261. Tadeusz, *supra* note 240.

262. See Tilmann, *supra* note 199, at 3.

263. See TFEU, *supra* note 22, at 71.

264. See *supra* II; Tilmann, *supra* note 199, at 4.

concerning the EPLA is no longer a basis for rejecting the Regulation, since Article 118 is an exception to Article 344, confining “interpretation or application of the Treaties” to the “ordinary” courts within the EU legal order.²⁶⁵ In brief, the contention that the EPO role in the proposed Patent Court is incompatible with EU law merely because it is a non-EU institution is highly doubtful.

B. The Exclusion of the ECJ in Matters of Substantive Patent Law is Not Viable

Even some proponents of the Patent Court voiced opposition to the draft agreement, arguing that the Patent Court should have the final say in patent matters. A unanimous resolution of the Intellectual Property Judges Association stated that Articles 6 through 8, concerning matters of direct infringement, indirect infringement, and limitations thereof, should be jettisoned from the Regulation to exclude the ECJ from adjudication of substantive patent law.²⁶⁶ According to the resolution, their inclusion would result in the new system failing to realize the goal of a better patent litigation system in Europe.²⁶⁷ Professor Robin Jacob, who is of this view, commented that inclusion of Articles 6 through 8 in the Regulation would be “disastrous,” with the non-specialized ECJ upsetting the judicial process, causing delays, and promoting uncertainty.²⁶⁸

Despite some impassioned protests against ECJ inclusion,²⁶⁹ wholesale exclusion of the ECJ role in the unitary patent project is unlikely to occur, for two reasons: (1) the Lisbon Treaty provision contemplates an active EU role in “uniform protection of intellectual property rights,” and (2) the ECJ is unlikely to concede competence since it has already held elements of patent law to be part of the EU legal order.

First, Article 118 of the Lisbon Treaty appears to explicitly mandate involvement of EU institutions in substantive patent law by setting out that any unitary patent Regulation should “establish

265. See TFEU, *supra* note 22, arts. 118, 344.

266. See Draft Unitary Patent Regulation, *supra* note 123, arts. 6–8; Robin Jacob, President of the Intellectual Prop. Judges Ass’n, Letter of Resolution (Nov. 2, 2011), *available at* <http://www.eplawpatentblog.com/2011/November/Venice%20Judges%20Resolution%202011%5B1%5D.pdf>.

267. *Id.*

268. *Id.*

269. See Ward, *supra* note 213.

measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union.”²⁷⁰ In one construction, Article 118 can only be used as a legal basis for the unitary patent Regulation if the Regulation contains provisions for “uniform protection” of intellectual property rights.²⁷¹ Read more expansively, the Article merely requires that the proposed Regulation create a basis of a unitary right, without mandating that EU law govern this right.²⁷² As between these two constructions, only the former is plausible. The signing parties to the Lisbon Treaty, keenly aware of the multinational enforcement problem of the *GAT* and *Roche* cases earlier discussed, would have objectively understood Article 118 to be calling for an active EU role in establishing “uniform protection.”²⁷³ This is further supported by the official EU press release accompanying the Lisbon Treaty, stating that “*if the EU legislator decides to make use of [Article 118], it could allow overcoming the present fragmentation of the EU in twenty-seven national copyright regimes (emphasis added),*”²⁷⁴ as well as the existence of Community design courts created under Council Regulation (EC) No. 6/2002.

Second, the ECJ has previously suggested that substantive patent law is part of EU law, and hence part of its jurisdiction. In its March 2011 opinion, for example, the ECJ declared that the creation of the Patent Court would deprive national courts and tribunals of the power, or obligation, to refer questions to the Court for a preliminary ruling in the field of patents.²⁷⁵ Implicit in this language is the assumption that patent law should be integrated with EU law to allow referrals to operate within the EU judicial framework.²⁷⁶ Such an assumption is also consistent with the involvement of the ECJ in intellectual property matters today.²⁷⁷

270. See TFEU, *supra* note 22, art. 118.

271. Tilmann, *supra* note 199, at 4.

272. See Opinion of Rt. Hon. Professor Sir Robin Jacob (Nov. 2, 2011), *available at* <http://www.eplawpatentblog.com/2011/November/Robin%2020Jacob%2020Opinion%2020re%2020Arts.pdf>.

273. See Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 827 (2007) (arguing that the intent of the foreign parties assenting to a treaty should govern interpretation of its terms).

274. Press Release, Eur. Union, Explaining the Treaty of Lisbon (Dec. 1, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/531>.

275. See March 2011 ECJ Opinion, *supra* note 244.

276. See Bender, *supra* note 24, at 3.

277. The ECJ has recently adjudicated both patent and community design matters. See, e.g., Case C-34/10, *Brüstle v. Greenpeace e.V.*, Judgment of the Court (Grand Chamber), ¶ 119 (Oct.

The ability, and obligation, of the Patent Court to refer questions to the ECJ for preliminary rulings in matters of infringement potentially adds uncertainty to the unitary patent system. In the long term, however, substantial benefits may arise from a counterbalance to the power of the Patent Court of Appeal. Once again, the CAFC provides a case in point. Since its inception, the CAFC has generally expanded patent-eligible subject matter and strengthened patent rights, developing a reputation as a pro-patent court.²⁷⁸ The same may occur in Europe. The danger is that a specialized court runs the risk of being myopic; by focusing on highly technical patent cases day in and day out, it may not appreciate the full breadth of nuanced policy interests as well as a court of more general jurisdiction. These reasons may help explain the U.S. Supreme Court's recent willingness to intervene in patent law cases.²⁷⁹ Thus, provided that the ECJ restrains itself, it can provide a valuable check on the Patent Court by clarifying matters of interpretation that could have adverse ancillary effects on the functioning of the EU.

Notable European judges and patent practitioners have also lambasted the prospect of ECJ involvement that could result in a massively inefficient, unpredictable and expensive court system, calling the package, as a whole, "worse than the system it is meant to

18, 2011), *available* at <http://curia.europa.eu/juris/document/document.jsf?docid=81836&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&cid=620544> (ruling that an invention will not be patentable if the subject matter of the patent application requires the prior destruction of human embryos or their use as a base material); C-281/10P, *PepsiCo, Inc. v. Grupo Promer Mon Graphic SA*, 2011 E.C.R. ¶ 53, *available* at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0281:EN:NOT> (where the ECJ defined an "informed user" as referring not to a user of average attention, but to a particularly observant one, based on personal experience or extensive knowledge of the sector in question).

278. See, e.g., Mireles, *supra* note 98, at 718 (noting that whereas the circuit courts had affirmed sixty-two percent of district-court findings of patent infringement in the three decades before the creation of the CAFC, the CAFC in its first eight years affirmed 90 percent of such decisions. On the other hand, when the district court had found that a patent was invalid or not infringed—thereby denying the patentee enforcement of the patent—the circuits had reversed only 12 percent of the cases. In the first eight years of the Federal Circuit, 28 percent of these cases were reversed.); Scott E. Atkinson, Alan C. Marco & John L. Turner, *The Economics of a Centralized Judiciary, Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 441 (Aug. 2009) [hereinafter *The Economics of a Centralized Judiciary*].

279. As a fairly recent U.S. example, consider *eBay Inc. v. MercExchange LLC*, in which the U.S. Supreme Court reversed the CAFC, holding that an injunction should not automatically issue based on a finding of patent infringement, but also that an injunction should not be denied simply on the basis that the plaintiff does not practice the patented invention. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

improve.”²⁸⁰ This fatalistic and false choice between achieving the goals of the unitary patent project and acceding to ECJ jurisdiction should be rejected. First, this view discounts any possibility of procedural solution to the aforementioned inefficiencies. The Patent Court agreement itself sets out rules of procedure adopted by the Administrative Committee that “shall guarantee that the decisions of the Court are of the highest quality and that proceedings are organised *in the most efficient and cost effective manner* (emphasis added).”²⁸¹ Such rules could conceivably inform, for example, how questions are qualified and consolidated and cabin the scope of referrals to the ECJ. Second, many of the particularly murky issues raised by the Regulation, such as patent assignments, voluntary and compulsory licenses, and government use, are expressly reserved as matters of domestic law for the participating member states,²⁸² and thus are likely to fall outside the purview of the ECJ in most disputes.²⁸³ Lastly, the ECJ does not operate within a vacuum, and could plausibly adapt to provide a coherent jurisprudence. For example, comity with the Patent Court could lead the ECJ to undergo reform,²⁸⁴ or at least temper its judicial activism so as to minimize legal interpretation conflict.²⁸⁵

While some growing pains are to be expected in any new legal regime, necessity will drive the convergence of jurisprudence allowing the Patent Court and ECJ to peacefully co-exist in the enforcement of a unitary patent. Sharing this responsibility will require mutual trust

280. See Ward, *supra* note 213 (quoting Dr. Jochen Pagenberg, past president of the European Patent Lawyers Association).

281. November 2011 Draft Agreement, *supra* note 153, art. 22.

282. See Draft Unitary Patent Regulation, *supra* note 123, at 9, 21 (wherein Article 10 declares national law to be generally applicable to the Unitary Patent as an object of property, and recital 9a expressly states that compulsory licenses will be governed by the “national legislation . . . of the member states”).

283. See, e.g., Case 244/80, Pasquale Foglia v. Mariella Novello, 1981 E.C.R. 3045, ¶ 18 (the Court declining jurisdiction where there was an absence of a genuine dispute).

284. As one example, the ECJ is authorized to establish specialist judicial chambers to hear certain categories of appeal. See Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Mar. 10, 2001, 2001 O.J. (C 80) 25–26, available at http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf (conceivably, a chamber having a suitably appointed composition could facilitate hearings on patent matters).

285. See Axel H. Homs, *BREAKING: Agreement on EU Unitary Patent Reached*, K/S/N/H: LAW BLOG (June 29, 2012), <http://blog.ksnh.eu/en/2012/06/29/breaking-agreement-on-eu-unitary-patent-reached>; Ullrich, *supra* note 120, at 54 (on the asymmetric distribution of jurisprudence between the ECJ and the new Patent Court with respect to the conventional European Patent presently granted under the EPC and the Unitary Patent).

between the two judicial institutions. On one hand, the ECJ must trust that the Patent Court does not allow questionable patents and associated litigation to proliferate.²⁸⁶ On the other hand, the Patent Court must trust the ECJ to tread lightly, especially concerning matters fundamental to patent law.²⁸⁷ It is insightful that the U.S. Supreme Court has largely avoided interference with the CAFC over its first 24 years of operation, thus giving the latter court time to establish its own jurisprudence.²⁸⁸

VI. CONCLUSION

Recent developments on the unitary patent regulation have not been bereft of drama. At the June 2012 European Council summit, unitary patent proponents triumphantly eliminated a major stumbling block only to resurrect yet another controversy.²⁸⁹ Both the European Council and the EPO ebulliently reported that negotiations at the summit had produced a “historic breakthrough.”²⁹⁰ In spite of the pending legal challenges filed by Spain and Italy²⁹¹ and much internal squabbling over the location of the Central Division of the Unified Patent Court,²⁹² negotiating member states (minus Spain and Italy) finally came to a compromise—Paris would be the seat of the Court’s central division and specialized clusters would be established in Munich and London.²⁹³ But with so-called “eurosceptics” and industry advocates leading the charge, the Council also issued in their Conclusions what is likely to be construed as a provocative declaration of mistrust of the ECJ: “We suggest that Articles 6 to 8 of the Regulation implementing enhanced cooperation in the area of the creation of unitary patent

286. See Steve Seidenberg, *The Big Patent Year Pending: This Term the Supreme Court May Make Some Big Changes in Patent Law*, 92 A.B.A. J. 14 (2006) [hereinafter *The Big Patent Year Pending*].

287. See *id.* (on the U.S. Supreme Court history of intervention with the Federal Circuit).

288. *Id.*; see also Thomas K. Landry, *Certainty and Discretion in Patent Law: The On Sale Bar, The Doctrine of Equivalents, and Judicial Power in the Federal Circuit*, 67 S. CAL. L. REV. 1151, 1208 (1993).

289. See Brussels European Council, June 28/29, 2012, *General Secretariat Conclusions*, EUCO 76/12 (June 29, 2012); see also Horns, *supra* note 285. The controversy over removal of Articles 6 to 8 from the Regulation certainly appears destined for a showdown at the ECJ.

290. *EPO Welcomes Historic Breakthrough on the Unitary Patent*, EUR. PAT. OFF. (June 29, 2012), <http://www.epo.org/news-issues/news/2012/20120629.html>; *EU Unitary Patent – A Historic Breakthrough*, EUR. COUNCIL (June 29, 2012), <http://www.european-council.europa.eu/home-page/highlights/eu-unitary-patent-%E2%80%93-a-historical-breakthrough?lang=en>.

291. See *Italy and Spain Block EU-wide Patent Talks*, *supra* note 129.

292. See Horns, *supra* note 285.

293. See Brussels European Council, *supra* note 289.

protection . . . be deleted.”²⁹⁴ With the Patent Court agreement still being negotiated by a sub-committee of the European Parliament mostly behind closed doors,²⁹⁵ legal wrangling over the Council’s recommendation will continue apace.

Notwithstanding the fate of Articles 6 through 8 in the current Regulation, European patent reform is imperative and the consequences of inaction loom large. The current economic crisis plaguing the fragmented European community underscores the need for a unitary patent and an integrated patent court to encourage innovation and investment, promote the free movement of goods and services throughout the internal market, and reduce litigation costs. Yet, in spite of the momentum generated by successful pan-European integration of intellectual property rights in the areas of plant varieties, trademarks, and most recently, designs, a battery of legal issues borne from incompatible existing European treaties has confounded the creation of a unitary patent system.

Proposals for a unitary patent system can be informed by present-day implementations of unitary intellectual property rights, including the U.S. federal court and Community design court regimes. The specialized Community design approach is preferred over that of the United States because it enables higher rates of precedential formation, leading to greater legal certainty. This, in turn, facilitates transactions associated with patent protection, encourages participation in the unitary patent system and ultimately lowers costs. The latest drafts of the unitary patent Regulation and Patent Court agreement and statute would substantially achieve the benefits of the Community design approach, while judiciously limiting participation in the agreement and strengthening the Patent Court’s obligations to comply with EU law.

Finally, calls to implement the unitary patent entirely within EU institutions and for exclusion of the ECJ from its enforcement are unfounded. The Lisbon Treaty provides an implied legal basis for the involvement of non-EU institutions such as the EPO, whose involvement would be necessary as a practical matter in administering a high quality unitary patent. Any Patent Court that excludes an ECJ role is unlikely to pass muster under EU law. Moreover, the U.S. court model suggests that a specialized patent court that is checked by a

294. *Id.*

295. *See* Horns, *supra* note 285 (reporting on the back room negotiations with the European Council by the JURI Legal Affairs Committee of the European Parliament concerning the agreement on the Unitary Patent and the related language regime).

generalist court can indeed flourish if given sufficient time and latitude to establish its jurisprudence. For the foregoing reasons, the latest draft of the Patent Court agreement and unitary patent Regulation may well have finally converged on a practicable approach that will propel the long awaited breakthrough Europe has sought for the better part of the last forty years.